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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND HAZELTINE CORPORATION, A CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC. IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

We should first point out that the government's brief[1] agrees with Hazeltine Research on a number of important

[1] The brief of the Solicitor General filed in response to the Court's Order inviting him to file a brief expressing the views of the United States is referred to herein as the "government's brief" and cited as "Govt. Br." All other abbreviations are as set forth at footnote 2, page 2, of our main brief and footnote 1, page 1, of our reply brief.

Where emphasis appears in quotations in this brief, it has been supplied by us unless otherwise indicated.

points as follows:

1. It agrees that Zenith has not shown any impact as to Australia and that Zenith's entire claim as to Australia is without merit (Govt. Br. 25, 30-32, n. 5).

2. It agrees that Zenith has shown no impact on its exports of radios to England and that this claim is without merit (Govt. Br. 25, 30-32, n. 5).

3. It agrees that the issue of legality of the Canadian and English pools need not be decided unless it should be determined that such pools in fact had an impact on Zenith's business during the claimed damage period, June 1959 to May 1963, or that such pools involve a threat to Zenith requiring injunctive relief (Govt. Br. 25, 57).

4. It agrees that, in any event, irrespective of the question of impact or legality of the pools, the amount of alleged damages claimed to be suffered by Zenith as to Canada and as to television in England during the four-year period has not been established (Govt. Br. 42-44, 54-57).

The government's brief tacitly admits that on the present state of the record the reversal by the Court of Appeals was correct, because essential findings as to impact were not made, but suggests that there is testimony by Zenith's witnesses which, if credited, could support findings to that effect. We disagree with that suggestion for not only is the testimony referred to discredited by the later admissions of the witnesses, by Zenith's contemporaneous documents, and by later proofs and findings, but even if believed it would not justify the findings which the government says are essential to Zenith's claim (see p. 11-15, 16-27, 33-46, *infra*).

With respect to whether it has been shown that acts of the pools had an impact upon Zenith's business during the

damage period, the government makes the following points:

(a) As to Canada, even under Zenith's theory of action, and irrespective of other considerations, it was essential for Zenith to establish that it was unable to obtain distributors during the four-year damage period because of acts of the Canadian pool occurring after the September 1957 releases (Govt. Br. 43, 45-46).

(b) As to England, even under Zenith's theory of action, and irrespective of other considerations, it was essential for Zenith to show that it had in fact an *intent* and capacity to enter the English television market during the alleged four-year period ("*i.e.*, did it intend to stay out of the English market until the English government decided whether to change transmission systems?") and that acts of the English pool after the lifting of the embargo in June 1959 were the cause of Zenith's failure to enter the market (Govt. Br. 51, 46-49, 52-53).

(c) The trial court had entered no specific findings as to the foregoing points and that such findings would be essential to any judgment in Zenith's favor (Govt. Br. 45-46, 52-54).

THE PUBLIC INTEREST AS TO THE TREBLE DAMAGE CLAIMS

The government's brief states that so far as the United States is concerned, its interest is to secure a determination whether, in reviewing the question of impact or injury, the Court of Appeals applied the correct standard or whether it imposed "an unduly heavy burden of proof of injury upon a treble-damage plaintiff" (Govt. Br. 29). The brief states that the United States has no interest in "the factual question whether the record does or does not support the district court's finding that Zenith was damaged," observ-

ing, however, that it "obviously is of greatest importance to the parties" (Govt. Br. 28).[2]

However, we suggest that there is another matter of public interest which the government has overlooked. As pointed out in our main brief (H.R.Br. 1-2), we recognize that treble damage actions serve as a means for enforcement of the antitrust laws. But we suggest that there is also a great public interest, involving the most basic concepts, to make sure that the courts do not enforce claims which are completely without merit, and that the policy of the antitrust laws is not misused as a vehicle for the assertion of baseless claims. Finding truth and doing justice is, after all, the purpose of any lawsuit, antitrust or otherwise.

We thus pose two questions:

> Would not the public interest be defeated by entry of findings of injury and damage on the basis of testimony which has been discredited and shown to be unreliable?
>
> Would not the public interest be defeated by excluding from consideration contemporaneous documentary material constituting records and admissions of the claimant, which affirmatively and conclusively demonstrate that the treble damage claim is completely baseless?

We most respectfully suggest that the effect of the government's contentions is to invite such results (see pp. 11-15, 16-18, *infra*). Apparently because it has "no interest in the resolution of the factual question" (Govt. Br. 28), the government overlooks the fact that what is involved here is a factual question having enormous potential consequences,

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[2] It is of paramount interest to respondents, for the $35,000,000 amount involved is over ten times the net book value of Hazeltine Research, and well in excess of the net book value of its parent Hazeltine Corporation, should it be held liable (see H.R.Br. 4-5),

so that the *factual determination of the truth must be of paramount importance.*

QUESTIONS PRESENTED

We do not agree with the phrasing of the questions presented in the government's brief (Govt. Br. 1-2), but urge that the questions presented on this appeal are those stated at pages 3-4 of our original brief.

ARGUMENT

I. THE COURT OF APPEALS DID NOT IMPOSE AN UNDULY HEAVY BURDEN ON ZENITH, AS A TREBLE DAMAGE CLAIMANT, BUT CORRECTLY APPLIED THE STANDARD OF RULE 52(a).

The government begins the argument of its brief by saying that its interest in this case is in seeing that the Court of Appeals applied a correct legal standard and did not impose an unduly heavy burden of proof of injury upon a treble damage claimant (Govt. Br. 28-29). But the Court of Appeals' opinion shows that it did not impose any unreasonable or heavy burden upon Zenith. On the contrary, it merely subjected the evidence to a careful scrutiny and applied the test provided in Rule 52(a) of the Federal Rules of Civil Procedure which has been applied many times by this Court. See *e.g., United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

Recognizing that the decision of the Court of Appeals is correct under Rule 52(a) as "ordinarily" applied (Govt. Br. 29-30), the government argues that special deference should be given the findings entered by the trial court in this case and, in effect, argues that the rule applicable to

jury cases should be applied here[3] because this is a private antitrust case won in the trial court by the claimant (Govt. Br. 29-30).[4]

A. There Is No Authority or Logic to Support the Contention That a Special Exception to Rule 52(a) Should Be Adopted by Reviewing Courts for Treble Damage Cases.

The government's contention that the rule applicable to the review of jury verdicts in treble damage cases should also apply in *non-jury* treble damage cases contradicts the express holding of this Court in *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948), that "judicial review of findings of trial courts does *not* have the statutory or constitutional limitations on judicial review of findings ... by a jury," and that an appellant court "*may reverse* findings of fact by a trial court where 'clearly erroneous'" (333 U.S. at 394-95).

Further, the government's brief is permeated with the suggestion that if there is *any* evidence to support a finding, regardless of its character or weight, the appellate

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[3] It is somewhat difficult to follow the government's point here. It appears to contend that the Court of Appeals erred in not giving some special deference to the trial court's findings, saying this special deference should be afforded the trial court's determinations "when these are based on adequate evidence and relevant and sufficiently specific findings" (Govt. Br. 30). But, the government itself then states that the findings are "deficient in critical respects," are not adequate and some are not supported by any evidence (Govt. Br. 32, 45-46, 52-53), thereby acknowledging that the trial court did *not* make "relevant findings."

[4] Just last year this Court rejected a similar argument that a special exception should be made in favor of plaintiffs in private antitrust cases in applying Rule 56(e). *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 88 Sup. Ct. 1575, 1593 (1968).

court may not set that finding aside (*e.g.*, Govt. Br. 51-52). This novel suggestion, which also appeared in Zenith's brief (*e.g.*, Z.Br. 86-88), is likewise contrary to the holding in *U.S. Gypsum*, 333 U.S. at 395, where this Court determined that:

> "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed."

The reason advanced by the government for applying the jury standard in private treble-damage cases (when the claimant wins) is that, because of the nature of the antitrust violation, the claimant might have difficulty showing with exactness the fact and amount of his alleged damages (Govt. Br. 29-30). But that rationale has no application here because: (1) the testimony of the witnesses upon which the claim rests is not only lacking in exactness, but these witnesses have been affirmatively shown to be lacking in credibility (see pp. 11-15, *infra*); and (2) the deficiency in the proof on "essential" elements of Zenith's case is not the result of anything the pool did, but is instead the result of the failure or inability of Zenith to offer evidence which, if the facts were as Zenith claimed, would have been in Zenith's possession or available to it.

For example, the government says that the "essential question" under Zenith's theory as to Canada was whether the pool in Canada prevented Zenith from having a nationwide distribution system during the damage period (Govt. Br. 45-46). But specific and concrete evidence of that fact, *if true*, would have been available to Zenith. Zenith could at least have identified the distributors which it had attempted to get and was unable to get. In fact, it could not identify a single one. Zenith could have produced documents or correspondence relating to attempts to get distributors and being turned down by distributors

because of concern for the pool. It produced none. Zenith could have taken distributor depositions and offered distributor testimony to the effect that the distributor had refused to handle Zenith's products because of concern for the pool, or would have handled Zenith's products but for the pool, or held back on its purchases, or had stopped handling Zenith's products because of the pool. *Had these things happened,* the evidence would have been in Zenith's own files or at least fully available to it (see H.R.Br. 52, 104).

This, then, is not a situation similar to that involved in *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946), relied on by the government (Govt. Br. 23-24, 34-38, 41-42). In *Bigelow,* the plaintiff proved that it could not get first-run motion pictures,[5] and its problem was to prove that it would have made more profits had it obtained those first-run motion pictures, and further, to prove the amount of the additional profits which it would have made. Under such circumstances, it may well be that the plaintiff is unable to prove with exactness that it would have made more profits, or the amount of those profits. But that is not the case here. This is not a case where there would be an "absence of more precise proof" because of the "tortious acts" of the defendant (327 U.S. at 264), for if Zenith had made unsuccessful attempts to obtain distributors during the damage period,

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[5] The government is not completely accurate in its statement that the evidence of *"fact and amount"* of damages in *Bigelow* consisted only of a comparison of plaintiffs' profits in their theatre during the damage period with their profits in an earlier period when they were able to get first-run films and a comparison of their profits with the profits of a competing theatre. In *Bigelow,* this Court expressly stated that the plaintiffs *"were not able* to procure such films during the five year [damage] period which followed, although there is evidence that *they made diligent efforts to do so"* (327 U.S. at 258). Thus, there was clear proof of impact or "fact of damage" in that case.

it could offer concrete and specific evidence of those attempts.

Indeed, in the case of Canada the government has noted the sharp contrast between the specific details and documentary corroboration of attempts to obtain outlets during the early and middle '50's (before the release), and the unspecific and uncorroborated testimony relating to the critical period in this case (Govt. Br. 40, n. 7). The obvious reason that the specific details and documentary corroboration are not available in the period after the release is that the facts which *did* exist before the release did *not* exist during the damage period of 1959-1963. If there were any doubt on that subject, it should certainly be resolved by reference to the Zenith Annual Reports in the offer of proof, for the 1959 Report in the very first year of the damage period unequivocally states that:

> "Zenith now has a strong distribution network at both the wholesale and retail level throughout Canada, supported by powerful national and local advertising" (A. 2993; H.R.Br. 57, 113-18).

B. The Special Circumstances of This Case Demonstrate That the Mechanically Adopted Findings of the Trial Court Are Not Entitled to Any Special Deference by the Reviewing Court.

Even if the special exception to Rule 52(a) urged by the government should apply in an ordinary treble damage case, it is clear that it should not apply in the special circumstances of this case which indicate that the findings are not entitled to special deference and, on the contrary, have little weight.

First, the trial judge wrote no opinion or findings, but instead "mechanically adopted" *verbatim* the findings submitted by Zenith. This Court has said that such findings do

not have the value of independently drafted findings of the trial judge. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). The government itself *admits* "the district court considered the case without appropriate attention to detail" (Govt. Br. 32). Yet it suggests that these "mechanically adopted" findings are entitled to even greater weight than "ordinarily" given to trial court findings (Govt. Br. 29-30).

Second, the government has conceded that the findings are "deficient in critical respects" (Govt. Br. 32), are "inadequate" on "essential" issues (Govt. Br. 45, 52, 53), and that certain of the findings dealing directly with the issue of impact are supported by "no evidence" and are "responsive to neither Zenith's theory nor the evidence". (Govt. Br. 53-54).

Indeed, the government itself points out that the very finding which it says is entitled to special deference, Finding XXXVI which states that Zenith's foreign commerce had been "drastically curtailed by the patent Pools in England, Canada, and Australia" (A. 2908), was clearly erroneous as to three of the six product markets involved, *i.e.*, as to radio in England, and as to both radio and television in Australia. The government concedes that the evidence "forecloses" that part of Finding XXXVI which concerns Zenith's exports of radios to England; and that the evidence furnishes "no basis" for that part of Finding XXXVI that concerns Zenith's exports of radios and television sets to Australia (Govt. Br. 30-32, n. 5). Under these circumstances, the balance of that same finding is surely not entitled to special and extraordinary deference, to say the least.

The government is thus in the anomalous position of arguing, on the one hand, that the findings of the trial

judge are entitled to special deference greater than that in an ordinary case, and at the same time conceding, on the other hand, that those findings are "inadequate" on "essential" issues, "deficient in critical respects," and unsupported by evidence in many instances (Govt. Br. 32, 45, 52, 53).

Third, the findings which were entered or, according to the government, *could* have been entered, are inconsistent with the contemporaneous documents in evidence and inconsistent with other documents erroneously excluded by the trial court, some of which are clear admissions against interest by Zenith, and as to which this Court may take judicial notice, at least in part (see pp. 16-18, 31, 36-43, *infra*).

Finally, the sole evidence to support findings on essential elements of Zenith's case is the testimony of interested witnesses whose testimony has been shown to be completely lacking in credibility on these and other important issues and in direct conflict with the contemporaneous documents (H.R.Br. 87-93, 112-22; pp. 12-15, *infra*).

C. A Reviewing Court Is Not Bound to Accept Testimony Shown on the Record to Lack Credibility.

The government's argument assumes throughout that the credibility of witnesses is the exclusive province of the trial judge (*e.g.*, Govt. Br. 50, n. 9), overlooking the fact that credibility of a witness is not to be determined solely on the basis of his demeanor, but can depend also upon other factors which an appellate court is equally qualified to consider, such as inconsistency of the testimony, conflict with contemporaneous documents, and the like (H.R.Br. 80-85). The record in the instant case is full of facts and circumstances, having nothing to do with demeanor, which

destroy the credibility of Zenith's witnesses:

(1) The witnesses Wright and Kaplan led the trial court to believe that the patent pools in England and Australia had kept Zenith out of those countries and from building up markets in those countries for many years prior to the start of the damage period (see H.R.Br. 18; A. 3446-47). It was later shown that governmental embargoes and *not* the pools had kept Zenith out of England and Australia, prior to the damage period (H.R.Br. 16-18). Thus, the testimony of these witnesses dealing with the very question of whether the pool had an effect upon Zenith's business at least for the period prior to 1959 was shown to be false.

The government admits that this contention of long exclusion "was" Zenith's "basic theory" of recovery and that this "basic theory" was shown to be baseless upon the finding of the governmental embargo (Govt. Br. 30, n. 5). It was after this "basic theory" was so exposed that these witnesses, on recall, brazenly changed their version of the facts (see H.R.Br. 18-25). But the effect of the government's position is that the Court of Appeals *must credit* the testimony of the witnesses who misled the trial court into adopting that original baseless theory.

(2) These same witnesses were forced on recall to recant testimony given at the original trial concerning attempts to enter the English television market, the conversion of sets to the English 405-line system by Zenith and by its distributor "in his back room," the sending of parts and kits to the English distributor to make such conversions, and the distributor's attempts to market converted sets (see H.R.Br. 32-40).

Again the government admits that such testimony was not truthful. It refers to this recanting of testimony by saying the witnesses "at least modified their 1964 assertions," talks about "variations in their testimony," but finally, admits the ultimate fact when it says this testimony could justify a conclusion that

"*other aspects* of their testimony were *also* unworthy of belief" (Govt. Br. 50, n. 9).

(3) At the original trial Wright and Kaplan did not tell the court they were taking any embargo into account in estimating Zenith's expected market share. When we asserted that governmental embargoes blocked Zenith's imports into England prior to June 1959 and into Australia prior to April 1960, Zenith's counsel vigorously and repeatedly denied our statement, and said Zenith could prove "*exactly the opposite*" (H.R.Br. 22, n. 14). Then, after a trial at which the court concluded that the embargoes "and nothing else" had blocked Zenith's imports into those countries, Wright and Kaplan said they had known about the embargoes all along and, in making their damage estimates, had assumed that they *were* a complete barrier (H.R.Br. 19-21). Zenith's counsel has now gone so far as to suggest that the embargoes (which he vehemently denied) were the reason Zenith waited until 1963 to file its counterclaim (H.R.Reply Br. 10).

The government's reference to this testimony (Govt. Br. 55) overlooks the fact that it is in conflict with Zenith's "basic theory" of recovery asserted at the original trial (see Govt. Br. 30, n. 5).

(4) These same witnesses claimed that Zenith could have obtained from 2.7 to 3.2 percent of the English radio market, if it were a free market (A. 465, 528-29; H.R.Br. 11). But, as the government points out (Govt. Br. 30-31, n. 5), these witnesses agreed that the Engglish radio market during the damage period 1959-1963 *was* a free market, yet during that period Zenith's actual sales were never more than two-tenths of one percent (0.2%) of the market (see DX 220, facing p. 22 H.R. Br.). Thus their "estimate" was 13 to 16 times greater than the fact. Either the Zenith witnesses deliberately overstated Zenith's ability to penetrate foreign markets, or they were badly uninformed. In either case, the credibility of their testimony is highly questionable.

The government agrees that this error of over one thousand per-cent in Zenith's estimate as to radio in England casts doubt upon their testimony as to television in England (Govt. Br. 56-57), and that it "might" also lead the trial court to re-examine its measure of damage as to Canada (Govt. Br. 57, n. 10).

(5) The trial judge himself found that the testimony of these witnesses estimating the market share Zenith could have achieved in England and Australia starting from "scratch" was not "believable" (see H.R.Br. 24-25; pp. 47-48, *infra*).

The government would apparently excuse this testimony as merely involving "a degree of puff"—even under oath (Govt. Br. 56). While the trial judge referred to the "pride of officers" in their company and its products, he also said: "The Court has difficulty in believing—and as I understand it; *I'm not bound by the fact that evidence is uncontradicted and undenied; it must be believable in the first instance.*" (A. 3525; H.R.Br. 24-25). Thus regardless of the reason for the inaccuracy in their testimony, the trial judge said it was *not* believable.

(6) These witnesses misled the trial court into awarding over $2.2 million for alleged lost profits as to radio sales in England and over $700,000 as to Australia (H.R.Br. 94; Govt. Br. 30-32, n. 5);

The government admits this (Govt. Br. 30-32, n. 5), yet asserts that the rest of the testimony of these same witnesses *must* be accepted by the Court of Appeals (*e.g.*, Govt. Br. 39-42).

(7) Wright asserted at the original trial that Zenith had held back on advertising in Canada because of the pool's activities, but on recall his fellow executive and Zenith's chief financial officer, Kaplan, admitted that Zenith's advertising expenditures were normal for entry into a new market (H.R.Br. 119-20);

The government admits these "discrepancies," but suggests they should be ignored because "not essential"

to Zenith's claim and that their affect on other aspects of Wright's and Kaplan's testimony is solely for the trier of fact (Govt. Br. 41, n. 8).

(8) The testimony of these witnesses on "essential" issues is directly contradicted by contemporaneous documentary evidence from Zenith's own files (see H.R.Br. 40-44).

The government acknowledges the conflict between the testimony and these documents in evidence, going so far as to say that one of the documents contains a "firm statement" in conflict with the testimony (Govt. Br. 51). But the government is nevertheless willing to "credit" the testimony. The government, while recognizing that "the evidence on this issue is conflicting," nevertheless says "it would support a finding" in favor of Zenith (Govt. Br. 52). However, as we point out at page 37-40, *infra*, this argument ignores the fact that the contemporaneous documents are controlling.

The government brushes aside these instances, apparently on the belief that these are factors to be considered only by the trial court and that the Court of Appeals was bound to close its eyes to them. On the contrary, these matters, which bear directly upon the credibility of the witnesses, can be judged as well by the Court of Appeals as by the trial court. Neither the government nor Zenith has disputed or even commented on the cases cited at pages 82 and 83 of our main brief, which hold that credibility involves more than demeanor and that it is a matter which an appellate court may take into account in reviewing trial court findings. While the issue of credibility may generally be for the trial court, there are instances, such as here, "in which the reviewing court *can and must* reverse when on the entire evidence it 'is left with the definite and firm conviction that a mistake has been committed'" *McDonald* v. *Kropp*, 373 F.2d 549, 558 (6th Cir. 1967).

The government does not deny that the Court of Appeals, in concluding that the trial court's findings were "clearly erroneous," applied the established standard, *i.e.*, that laid down by this Court in *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). Particularly in the circumstances of this case, that standard imposes no undue burden on the antitrust treble damage claimant. Indeed, to apply any other standard would prevent the Court of Appeals from doing justice where required. For if the government's position is adopted, an appellate court (and even this Court) could not reverse findings of a trial court if there is *any* testimony consistent with the findings, even though the appellate court, upon a careful review of the entire evidence, is left with a firm conviction that the trial court has made a mistake. Carried to its logical extreme the government's argument would produce the result that the Court of Appeals could not correct a gross injustice if there is *any* testimony to support the finding of the trial court, no matter how untruthful that testimony is shown to be, and no matter to what extent contradicted by contemporaneous documents.

II. CANADA

A. A Finding Favorable to Zenith on the Essential Question of Whether the Pool Prevented It from Obtaining a Full-Fledged Canadian Distribution System During the Damage Period is Foreclosed by Zenith's Annual Reports.

The government's brief acknowledges that the validity of Zenith's claim of damage for Canada rests on "the essential question whether Zenith was unable to obtain a full-fledged Canadian distribution system during the damage period," and that the findings of the trial court are "defective in their failure to state specifically whether Zenith was

unable to find Canadian distributors during the relevant 1959-1963 period, and, if so, whether that inability was attributable to the activities of the pool" (Govt. Br. 45-46). In view of this, the government urges that the case be remanded to the trial court "to make findings on this issue" (Govt. Br. 46). Although we agree with the government's analysis of the theory of Zenith's claim and its statement of some of the defects in the trial court findings, we do *not* agree with its assertion that the evidence would warrant a finding of fact of damage.

On the assumption that the basic purpose of any litigation, antitrust or otherwise, is to ascertain the truth, we point out at the outset that the contemporaneous documentary public admissions of Zenith in its Annual Reports conclusively demonstrate that what the government concedes is a "necessary element" of Zenith's claim could not be shown. Pointing out that the trial court made no finding on this issue, the government says that "the essential question" was:

> "[W]hether Zenith was unable to obtain a full-fledged Canadian distribution system during the damage period" (Govt. Br. 45-46).

The 1959 Annual Report, covering the very first year of the damage period, answers that question in unequivocal terms:

> "Zenith *now* has a strong distribution network at both the wholesale and retail level throughout Canada" (A. 2993; see H.R.Br. 114).

The continued operation of this "strong distribution network . . . throughout Canada" was reflected in Zenith's 1961 Annual Report which stated that "the enthusiasm of distributors and dealers have created a growing demand for Zenith products" (A. 2995). Indeed, without "a full-fledged

distribution system," Zenith would have not been able to achieve the substantial success which it did enjoy in Canada during the damage period, as shown not only by the Annual Reports which use such phrases as "gratifying progress," "successfully countered the downward industry sales trend," "important gains," "marked progress," and "substantial gain" in referring to Zenith's radio and television sales in Canada (H.R.Br. 56-59, 114-15), but also by Zenith's actual Canadian sales statistics, put in evidence by Zenith, which reflect the sales of tens of thousands of sets in Canada in the damage period (H.R.Br. 50-51).

Despite the fact that these documentary public admissions are dispositive of the "essential question" (Govt. Br. 45), the government would apparently have this Court close its eyes to these reports and assume that the trial judge could find just the opposite, merely because he did not receive the reports in evidence (Govt. Br. 33-34). In the interest of justice, this Court can and should consider these reports (see pp. 28-32, *infra*). However, as we shall show in succeeding sections, irrespective of the Annual Reports, the record shows that Zenith failed to prove that it was prevented from establishing a full-fledged distribution system because of the activities of the pool and that the Court of Appeals was clearly correct in concluding that the trial judge had made a mistake in inferring the fact of damage.

B. The Testimony Relied Upon by the Government to Support its Argument That a Finding of Impact "Could" Have Been Made is Not Relevant, Adequate or Credible.

The government asserts (Govt. Br. 37-38) that the evidence upon which a finding of impact *could* have been made falls into three categories: (1) the historical background

from 1927 to the later 1950's, (2) testimony as to the pool's alleged impairment of Zenith's ability to establish a distribution network, and (3) the opinion of Zenith's executives that but for the pool's restrictions Zenith would have had the same share of the Canadian market as it had of the United States market.

Reliance upon testimony falling in the first and third categories is foreclosed by the release given by Zenith on September 27, 1957. The government acknowledges that the release by its terms released "all damages, past or future, resulting from all . . . acts up to the date of the release" (Govt. Br. 42). Thus, the release forecloses reliance upon acts which occurred prior to September 27, 1957, as the cause of Zenith's damages recoverable in this case. To the extent that any shortcomings in Zenith's distribution system (and any resulting lack of profits) during the damage period was a result of acts which occurred prior to September 27, 1957, recovery is barred by the release (H.R.Br. 47-49, 122). The government does not dispute this principle (Govt. Br. 42-43).

The release also forecloses reliance upon the opinion testimony of Zenith's witnesses estimating Zenith's prospective market share in Canada. That estimate was admittedly based upon the alleged exclusion of Zenith from Canada for many years prior to the damage period, including the years prior to the release (see H.R.Br. 18, n. 13, 21, 61-62). On the issue of the amount of damages, the government apparently recognizes that the proper estimate would be one which estimates the share of the market Zenith would have obtained during the damage period, starting "from scratch" after the 1957 settlement (Govt. Br. 44). But the government fails to recognize that the Wright-Kaplan testimony suffers from the same defect on the issue of impact. It cannot be considered evidence of impact in

the damage period from pool activity after the settlement because it was admittedly based upon the assumption of a right to recover for the acts which occurred many, many years prior to the start of the damage period and thus necessarily before September 1957 (H.R.Br. 18, 21, 61-62).

The government does not dispute the *effect* of the release but does erroneously suggest that the record is "unclear" as to whether the trial court allowed Hazeltine Research "to assert the release as an affirmative defense," or merely allowed a motion to be filed "seeking leave to seek such an amendment" (Govt. Br. 44). It even suggests that leave to file the defenses may have been denied (Govt. Br. 44), although there is no record reference cited for such a "denial" and no basis in the record or in fact for such a suggestion.

The government refers to one record reference which is unclear (A. 3040) and completely *ignores* the other references which make it entirely clear that the trial court *granted leave to file the defenses* of release and limitations and *that they were in fact so filed.*

The transcript of the April 1, 1965 proceedings show this beyond any doubt (A. 3036-37). Counsel for Hazeltine Research orally moved for "*leave* at this time *to file* within a short date *our affirmative defenses* as a formal pleading of release and statute of limitations" (A. 3036), and the court granted the oral motion, saying "the record will show that *leave is given to file them at this time,* after proofs are closed and after findings have been made" (A. 3036, 3067). Further, the transcript for April 1, 1965 (printed in the Court of Appeals Appendix on file in this Court), shows in Volume IV, page 2043, the following colloquy later in the proceedings:

"Mr. Kayser (counsel for Hazeltine Research):

And, your Honor, how long may I have *to file* this

[these] *affirmative defenses?*

"The Court: 5 days *nunc pro tunc* as of today."

Such "Defenses of Hazeltine Research, Inc.," were filed April 2, 1965, and recited that "Hazeltine Research, Inc., . . . pursuant to leave granted by District Judge Richard B. Austin, United States District Judge, on April 1, 1965, on motion of counsel for Hazeltine Research, Inc., *hereby files nunc pro tunc* as of April 1, 1965, the following defenses:" (A. 3049). These defenses were release and statute of limitations (A. 3049-53).

Finally, the list of "Relevant Docket Entries in District Court" includes the following:

> "4/2/65 Filed defenses of Hazeltine Research, Inc." (A. 5).

We suggest that the record is not "unclear." On the contrary, it is undeniable that the trial court allowed the filing of the defenses. We are at a loss to understand how the government's brief writer came to his conclusion.

We now turn our attention to the testimony on the issue of alleged pool interference with Zenith's ability to establish a distribution network in Canada after the settlement. On pages 39-40 of its brief, the government purports to summarize Wright's testimony "of Zenith's difficulties in establishing a network of distributors in Canada." While this summary is more accurate than that contained in the Zenith brief, it does not correctly summarize Wright's testimony. For example, the government says that Wright "testified that Zenith had approached potential distributors in these localities [the Central and Maritime provinces of Canada], but had found them unwilling to handle Zenith's goods and that they attributed this reluctance to the threat of infringement actions by the pool" (Govt. Br. 40). For this statement the government cites pages 450, 455-56 and 458 of

Volume I of the Appendix.

On page 450, Wright testified that following the settlement of the Zenith-RCA litigation in September 1957:

> "[Zenith] went to Canada and made an effort to secure wholesale distributors and other people to participate with us in the marketing of our products and to really build up from virtually no business at all to a thriving business. And we were in the process of doing this and of building a marketing organization in Canada when just about one year later this advertisement appeared, which I must say came as a great surprise to us because we had assumed that this Canadian Radio Patents Limited situation had been ended with the settlement of the RCA case."

There is thus no testimony on page 450 that distributors had been unwilling to handle Zenith's goods and had attributed their reluctance to the threat of infringement suits.

On pages 455-56, Wright again talked about the settlement of the RCA case and the licenses under pool patents which Zenith had from Canadian General Electric, RCA and others, and was asked whether Zenith was able to develop business in Canada after the settlement. He answered:

> "We were able to put on some distributors in Canada, particularly in Western Canada, and we developed through Zenith Radio Corporation of Canada our own distribution in Ottawa and Ontario, and I believe Quebec; so we have gradually increased our business in Canada despite the fact that there still hangs over us this threat from CRPL" (A. 456).[6]

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[6] This testimony about appointing distributors in western provinces and being less successful in the central provinces and the maritime provinces of Canada is substantially repeated at pages 472-73 during cross-examination, but the government does not cite to these statements. Again, it does not support the government's summary.

Thus, there is also no testimony on pages 455-56 of Wright's testimony that distributors were unwilling to handle Zenith's goods, and that they had attributed their reluctance to threats of infringement actions by the pool.

On page 458, referring to the pool advertisement in the trade publication which had run in August 1958 and never again appeared (see H.R.Br. 51-52), Wright testified that:

> "This has a serious effect on your ability to get the kind of distributors that you would need to do the kind of marketing job that we have been talking about, to be able to get them to make the kind of investment and do the promotion and the advertising and to build a sales force that will do it."[7]

This testimony also is not a statement that any distributor actually had turned down Zenith and attributed his unwillingness to handle Zenith's goods to the threat of infringement actions by the pool. Moreover, since it relates to the advertisement which appeared in August 1958, almost a year before the start of the damage period, it certainly can not be considered evidence that Zenith attempted to get distributors in the damage period, that these distributors were unwilling to handle Zenith's products, and that they attributed their unwillingness to the threat of infringement actions by the pool. In addition, the testimony of Wright must also be considered in light of his statement that he could recall no complaint by a dealer or prospective dealer since 1958 (A. 471-72). We respectfully submit that the government is reading too much into Wright's testimony.

Not to be ignored on this issue is the important fact that Zenith was unable to offer any correspondence or other

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[7] Similar testimony appears at A. 490, but it also does not support the government's characterization of Wright's testimony.

documentary evidence of any dealer or distributor refusing to handle its products during the damage period (or at any time after the release); and Wright did not even identify a single distributor who had turned Zenith down.[8] As noted by the Court of Appeals, no Canadian distributor was called as a witness by Zenith (A. 4258). While contending that it goes only to the weight to be given to the testimony, the government admits that:

> "It is true, as HRI points out (Br. 52), that Wright's testimony is lacking in particulars; once the mid-1950's are passed, there are no specific details given of who was approached or when, and there is no documentary corroboration of the claimed attempts to obtain outlets, as there was regarding similar efforts during the early and middle 1950's" (Govt. Br. p. 40).

[8] While the government acknowledges the total absence of any evidence of pool interference with any Zenith distributors or dealers in the damage period (Govt. Br. 45-46), it refers, in a manner which may be misleading, to a letter which the Canadian pool sent to a Motorola dealer in 1962. This letter had been sent to a Motorola dealer in Nova Scotia. At the request of Zenith, MacCuspie, the Zenith dealer in the same town, obtained a copy of the letter and forwarded it to Zenith (DX 162-D, A. 2053). In referring to this incident (Govt. Br. 10), the government characterizes MacCuspie as having been a Zenith distributor who dropped the Zenith line when threatened with infringement actions "ten years before." However, apparently because it was misled by an erroneous statement in Zenith's brief (see H.R.Br. 109), the government neglects to point out that MacCuspie was *back in business as a Zenith distributor* at the time of the letter to the Motorola dealer in 1962. Indeed, as we pointed out in our main brief (H.R.Br. 109), both the fact that the pool sent no such letter to MacCuspie, who was then a Zenith distributor in the same town as the Motorola dealer, and the wording of MacCuspie's forwarding letter, make it quite clear that the pool was not interfering with MacCuspie's distribution of Zenith sets, and that he no longer considered that the Canadian pool was a threat to Zenith dealers or distributors.

What the government overlooks is the fact that Zenith obtained and offered specific details and documents relating to the much earlier period but did not do so for the 1959-1963 damage period. This in itself strongly indicates that the conditions were not the same during the damage period.[9]

Certainly, considering all the circumstances, the Court of Appeals could take into account this total lack of direct and specific evidence which would have been fully available to Zenith, if Zenith actually had trouble finding distributors to handle its products in the damage period. Indeed, as this Court pointed out in the leading case of *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226 (1939):

> "The production of weak evidence when strong is available can lead *only* to the conclusion that the strong would have been adverse. *Clifton* v. *United States,* 4 How. 242, 247. Silence then becomes evidence of the most convincing character."

The suggestion in the government's brief that "the very nature of the violation" would deprive Zenith of other or more convincing proof (Govt. Br. 36) simply cannot apply

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[9]At one point in its brief, the government suggests that the "finder of fact was entitled to attribute the pool's relative quiescence during this [damage] period to the success rather than the collapse of the pool's opposition" (Govt. Br. 39). Of course, even if true, this has nothing to do with whether distributors actually turned down Zenith during the damage period because of the pool. But the suggestion of the government is, in any event, contrary to the record. Zenith's exhibits in evidence show that in the damage period Zenith's sales in Canada increased substantially, amounting to tens of thousands of sets annually, and rising to as much as 5 per cent of the Canadian market (before the tariff was increased) (see H.R.Br. 50-51). A finder of fact could hardly conclude from this that the supposed pool's opposition had been a success.

to the "essential question" here; *i.e.*, whether Zenith had actually been turned down by distributors or dealers during the damage period. Direct and specific evidence would be available if Zenith had been turned down by any dealers or distributors (see pp. 7-9, *supra*).

The Court of Appeals did not ignore the testimony of Wright. In fact, it said that this testimony might be considered "some slight evidence" of the fact of damage (A. 4258), and, in effect, that is all the government says it is. However, considering the entire record in this case, the Court of Appeals was left with the "firm conviction" that the trial court "made a mistake in inferring from the entire testimony that the essential element of the fact of damage had been established by Zenith" (A. 4259).

In arriving at that conclusion, the Court of Appeals was not only entitled to take into account the vagueness of the Wright-Kaplan testimony, the lack of corroboration for it in sharp contrast to the evidence which existed prior to 1957, and the other factors in the record; it was also entitled to take into account the other testimony and evidence in this case which showed the total lack of credibility of Wright and Kaplan (see pp. 11-15, *supra*).[10]

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[10] It should also not escape this Court's attention that Wright gave other testimony *as to Canada* which was shown to be untrue, *i.e.*, his testimony at the original trial in February 1964 to the effect that Zenith had scaled down its advertising because of the pool's activities. This testimony was exposed as being untrue by the recall testimony of Kaplan in November 1965 when he admitted on cross-examination that Zenith's expenditures in Canada were normal for entering a new market (A. 3459), and shown to be untrue by other facts, including Zenith Exhibit 218 which showed extensive use of advertising (H.R.Br. 111-12, 114). The Court of Appeals pointed this out (A. 4259).

The government brief, in its persistent tolerance of the unreliability of the testimony of Zenith's witnesses (Govt. Br. 41, n. 8, 50,

The government's assumption that the Court of Appeals is bound to credit the uncorroborated and non-specific oral testimony of an interested witness, no matter what else the record shows concerning the lack of credibility of that witness, is not only unsupported by either logic or authority but is directly in conflict with the rule that an appellate court can and should consider credibility (not involving demeanor) in reviewing findings under Rule 52(a) (see p. 15, *supra* and pp. 39-40, *infra*).

Contrary to the suggestion of the government (Govt. Br. 34), there is no need for the application of "reasonable probabilities" in this case. The truth of the matter is before this Court in the form of Zenith's Annual Reports. The government's brief states that the Wright and Kaplan testimony "necessarily contains some element of speculation" and that:

> "As in *Bigelow, no person can be certain . . . whether* it [Zenith] would have been able to obtain a Canada-wide group of distributors notwithstanding the pool. . . . Perhaps it *might* have produced other or more convincing proof" (Govt. Br. 41).

There is no need to engage in "speculation." Zenith knew the truth, it had the proof, but it did not produce it. That proof was contained in the admissions in Zenith's Annual Reports, produced in the offer of proof of Hazeltine Re-

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n. 9), appears to excuse what it calls these "discrepancies" by stating that Wright's discredited testimony "is not essential to support a finding of impact as to Canada" (Govt. Br. 41, n. 8). But these "discrepancies" were before the Court of Appeals at the time it reached its firm conviction, after reviewing the entire record, that despite the "slight evidence of the fact of damage" contained in Wright's testimony, the trial court made a mistake in inferring that the fact of damage had been proved (A. 4257-59).

search, over the objection of Zenith (H.R.Br. 55-60). These contemporaneous documentary admissions expose the sham of Zenith's claim. For example, there can be no uncertainty or "speculation" as to whether Zenith "would have been able to obtain a Canada-wide group of distributors notwithstanding the pool" (Govt. Br. 41). Zenith admitted that it had in fact done so by 1959 when it said:

> "Zenith now has a strong distribution network at both the wholesale and retail level *throughout* Canada" (A. 2993).

In the face of this statement, how can there now be said to be any question whether Zenith "would have been able" to obtain Canada-wide distribution? There can be no denying that *it did*—a strong distribution network—at both the wholesale and retail level—throughout Canada.

C. The Statements Contained in Zenith's Annual Reports Are Conclusive and the Government's Apparent Suggestion That They Be Ignored Would Result in a Denial of Justice.

The Annual Reports of Zenith (H.R.Br. 55-60) and a great deal of other evidence in the form of documents and proffered testimony are contained in offers of proof made by Hazeltine Research after the original findings were entered but before judgment. Saying that "it is ordinarily held" that the determination of whether to reopen a case is within the informed discretion of the trial court, the government states that "we limit our discussion of the evidence to that actually in the record" (Govt. Br. 34). But where, as here, the proffered materials show that the asserted facts which are essential to Zenith's case cannot be true, it is certainly not in the public interest, but contrary to the interests of justice, to ignore these materials. Indeed, it would seem *no more* in the public interest to see that

the Court of Appeals does not impose an "unduly heavy burden of proof of injury" upon treble damage plaintiffs, as the government says (Govt. Br. 29), than to insure that multi-million dollar judgments, constituting a death sentence to a party, should not be sustained when the Court has before it documentary proof conclusively showing that the claim is a sham.

While it is our position that the decision of the Court of Appeals should be sustained irrespective of the offers of proof, we do believe that the government is wrong under the circumstances of this case in stating that "it is difficult to conclude that the trial court's denial of the belated request to reopen the entire case was improper" (Govt. Br. 34). This is not an ordinary case in which the evidence offered is merely repetitious or cumulative, and therefore, would not change the result. *E.g., Ditter v. Yellow Cab Company,* 221 F.2d 894 (7th Cir. 1955). The evidence proffered here goes right to the heart of Zenith's claim and exposes it as baseless. Indeed, the government's own argument with respect to Canada shows this fact, for it says that the "essential question" was whether Zenith could get distributors in Canada during the damage period (Govt. Br. 45-46).

Thus, far from "an ordinary case," this case falls within the principle applied in *Smith v. Dravo Corp.,* 203 F.2d 369, 377 (7th Cir. 1953), where the Court of Appeals held it was error not to receive evidence offered late, saying:

> "Looking at the evidence against an outline of a perfectly tried lawsuit, it was part of the case in chief. But we are of the opinion that, despite this fact, the District Court should have heard the testimony. It was, after all, *concerned with ascertaining the true facts* in a sharp dispute. Had this evidence been merely cumulative we might take a different view of its ex-

clusion. But it stood alone serving to prove the very heart of plaintiff's case with respect to the customer lists. In the exercise of its sound judicial discretion the court should have admitted this evidence" (203 F.2d at 377).

The evidence not only went directly to the heart of Zenith's case, but it was in the form of contemporaneous documentary admissions of the highest character, being published public reports in which Zenith was bound to tell the truth. This Court has repeatedly held that contemporaneous documents are controlling and cannot be denied. See *United States* v. *DuPont & Co.*, 353 U.S. 586, 602 (1957); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948); *United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966). In *DuPont*, the contemporaneous documents which were held to be controlling, specifically included annual reports. The government's brief overlooks these decisions and the logic which supports their rule.

The effect of the government's position with respect to the offers of proof would be to place procedural rules ahead of the achievement of substantial justice. In *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), this Court pointed out that pervading the modern procedural rules is the "basic purpose . . . to administer justice through fair trials. . . . These rules were designed in large part to get away from some of the old procedural booby traps. . . ." See also *Foman* v. *Davis*, 371 U.S. 178, 183 (1962); *Schaedler* v. *Reading Eagle Publication, Inc.*, 370 F.2d 795, 798 (3d Cir. 1967).

"[A] lawsuit is not a battle or contest of wits; it is a fair struggle for a just decision * * *. It is the primary duty of the court to render justice and fairness to all persons concerned in any litigation. . . ." *Bowles* v. *Six State Coal Corp.*, 64 F.Supp. 651, 652 (W.D.Pa. 1946). To the end of

achieving justice, reviewing courts have repeatedly encouraged liberal reception of evidence, particularly in non-jury cases. See, *e.g.*, *Builders Steel Co.* v. *Commissioner of Internal Rev.*, 179 F.2d 377 (8th Cir. 1950). As noted by the Court of Appeals in *Halverson* v. *Campbell Soup Co.*, 374 F.2d 810, 812 (7th Cir. 1967), a district court may exercise discretion "to conduct a fair and orderly trial," but its principal role is to "insure a fair trial" and it is an abuse of discretion for it to bar important evidence.

This Court, in *Marconi Wireless Telegraph Co.* v. *United States*, 320 U.S. 1, 48 (1943), pointed out that one of the factors a trial court should consider in deciding whether to reopen a case is "whether adequate consideration of the question [at issue] . . . can be had on the existing record, or whether additional testimony should be received. . . ." See also *In re Barry Yao Co.*, 286 F.2d 299, 302 (9th Cir. 1961), *reversing*, 175 F.Supp. 726 (S.D. Cal. 1959). We respectfully submit that once these Annual Reports were made known to the trial court before entry of judgment, it could not in fairness resolve the issues in this case as to Canada in favor of Zenith.

There can be no doubt that this Court can consider the offers of proof including the Annual Reports,[11] particularly since it was error for the trial judge to refuse to admit them in evidence. See *Boston and M.R.R.* v. *David*, 167 F.2d 722, 725-26 (1st Cir. 1948); and *Severi* v. *Seneca Coal & Iron Corp.*, 381 F.2d 482, 490 (2d Cir. 1967), where, as here, the excluded evidence was "documentary evidence" and "a statement by a party against its interest" (381 F.2d at 490). See also, *Rose* v. *Great Northern Ry. Co.*, 268 F.2d 674, 678-79 (8th Cir. 1959). This is particularly so where the

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[11] Since the Annual Reports are public records, the Court should be able to take judicial notice of them. See H.R. Br. 117, n. 53.

excluded evidence is being used, as here, to affirm the decision of a lower court, in this case the Court of Appeals. See *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957), cited at footnote 54 page 117 of our main brief.

D. The Judgment of the Court of Appeals Should Be Affirmed But If Not Affirmed There Should Be a Remand for Full Consideration of All Available Evidence on the Issues Remanded.

The government suggests that there should be a remand to the trial court with respect to Canada both on the issue of impact and on the issue of the amount of damages (Govt. Br. 44-46). However, on the issue of impact the government appears to suggest that the remand should be limited to the trial court's consideration of the existing record, apparently without receipt of any additional evidence. The government thus appears to take the position that the interests of justice could be served by remanding the case to the trial judge to permit him, based on the vague generalities of an interested witness, unsupported by any documents or corroborating evidence, to find that Zenith was unable to get distributors in Canada in the damage period, when at the same time it is known by all that Zenith unequivocally stated that it *was* able to get distributors throughout Canada at all levels of trade by the year 1959 (pp. 16-18, *supra*).

We urge that the decision of the Court of Appeals as to lack of impact with respect to Canada should be affirmed. But, if not affirmed, we submit there must be a remand and upon such remand the interests of justice could be achieved only by the trial court's receipt and consideration of all available relevant evidence.

With respect to the amount of damages, the government agrees that the trial court did not consider the effect of

release given in September of 1957 (Govt. Br. 42-44). It also appears to agree that the proper measure of damages, assuming that there was some impact after the 1957 release, would be "the difference between what Zenith earned in Canada during the damage period and what the district court finds [on remand] would have been earned if Zenith started from scratch, as it tried to do, after the 1957 settlement" (Govt. Br. 44). We submit that Zenith offered no such evidence, unless it is the evidence of the substantial sales which Zenith did make in Canada during the damage period (see H.R.Br. 50-51). This evidence shows that what Zenith "tried to do" resulted in substantial sales in Canada and in fact that Zenith did as well there as it reasonably could have been expected to do after starting in the market in 1958.

We urge that the decision of the Court of Appeals should be affirmed with no remand to the trial court. On the other hand, if the Court should conclude that findings of impact could be made, there should be a remand both on the issue of impact and the issue of the amount of damages which should include consideration of the release and all relevant evidence the parties can produce upon such issues.

III. ENGLAND

A. The Error in the Critical Findings Pointed Out By the Government Is Alone Sufficient Basis For Affirming the Decision of the Court of Appeals As to England.

Throughout this litigation, including its briefs to this Court, Zenith has argued with respect to England that it had been injured because "[*t*]*he record shows* that throughout the years Zenith made many efforts to enter the English market" and that "[o]n each occasion, however, the Pool threatened its distributors so they ceased buying Zenith

products" (Z.Br. 33). At the trial, Zenith proposed and the trial court entered Finding XXI which paraphrased this argument and stated (A. 2901):

> "XXI. For years Zenith made every effort to export home receivers to distributors and dealers in the English market. *On each occasion, however, the Pool threatened its distributors until they ceased buying* Zenith products and no substantial trade outlets could be found which would risk handling the line since the Pool would not license the sale of imported merchandise."

We pointed out that this finding was clearly erroneous for a number of reasons (H.R.Br. 86-95), *and the government agrees.* It correctly points out that this is the *only* finding relating to Zenith's alleged attempts to get distributors in England, and that there is *"no evidence* that Zenith television sets were ever sent to England and met with threats or that threats ever caused distributors to stop handling them" (Govt. Br. 52-53). Accordingly, the government concludes that Finding XXI "is responsive to *neither* Zenith's theory *nor the evidence*" (Govt. Br. 54), and that there are insufficient findings "to justify the district court's conclusionary finding that Zenith suffered injury to its trade or business of exporting television sets to England" (Govt. Br. 52).

The anomalous position of the government is that, on the one hand, it argues that the Court of Appeals should have given special deference to the findings of the trial court, but, on the other hand, the government itself correctly points out that the trial judge was so unfamiliar with the facts in this case that he entered without change Zenith's finding (indeed, the only specific finding relating

to distributors in England) which was supported by "no evidence."[12]

We submit that this fact alone requires an affirmance of the Court of Appeals' decision with respect to English television. Certainly, Zenith should not be permitted to have the decision of the Court of Appeals reversed when, as the government recognizes (Govt. Br. 53-54), Zenith misled the trial court into adopting this finding for which there is no evidence and continues to assert in this Court, as a basis for reversal of the Court of Appeals, that the statements contained in the finding are true and supported by evidence. Under such circumstances, the decision of the Court of Appeals should be affirmed without consideration of any other issues with respect to television in England.

B. There Is No Evidence to Support a Finding of Fact of Damage.

The government's brief admits that in order to show the fact of damage or impact as to England, Zenith must have established (1) "an intention and preparedness to engage in" imports of television sets (Govt. Br. 48), *and* (2) that Zenith in fact failed to enter the television market during the four-year period because of "the pool's activities"

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[12] The government also overlooks the full significance of the trial judge's error in awarding Zenith over $2.2 million with respect to alleged lost sales of radios in England when, in fact, there was absolutely no basis for any such award (Govt. Br. 30-31, n. 5). While the government acknowledges that the gross error in the estimate of the Zenith witnesses as to what Zenith could have done in the English radio market casts doubt upon their estimate of what Zenith could have done in the English television market (Govt. Br. 57), it fails to recognize that the making of such a spurious claim by Zenith and the blind adoption of such findings by the trial court reflects adversely not only on the credibility of Zenith and its witnesses, but also upon *all* the findings of the trial court, including those as to Canada.

(Govt. Br. 53). A finding against Zenith on either issue would mean it failed to prove damaging impact.

While the government acknowledges that the trial court entered no findings on these essential issues, it contends that there is evidence which, although it could go either way, would support findings in favor of Zenith on these questions (Govt. Br. 52). We respectfully submit, however, that the evidence conclusively shows that Zenith did not intend to enter the English television market during the damage period, and that Zenith did not show that it failed to enter the television market because of "pool activities."

1. Zenith Had No Intention of Entering the English Television Market Until the 625-line Standard Was Adopted.

The government correctly spells out as a "sound principle" the requirement that:

> "... it is necessary to state facts showing an intention and preparedness to engage in business" (Govt. Br. 48, 49).

In discussing that requirement, the government states:

> "If an antitrust plaintiff *would not have sought* or would not have been able *to enter a market even in the absence of the defendant's exclusionary activity,* then the violation was not the proximate cause of injury; indeed, where the independent reason for not entering is the claimant's own lack of interest, or own lack of ability, there has been no injury" (Govt. Br. 49).

As we pointed out in our main brief (H.R.Br. 40-44), contemporaneous documents in evidence, consisting of correspondence between Zenith and its English distributor, conclusively establish that there *was* an "independent reason" for Zenith not entering the English television market during the damage period, *i.e.*, that it was waiting for the English government to change its standard of transmission

from the unique British 405-line system to the widely used 625-line system. And the Court of Appeals so held (A. 4257).

The government refers to evidence that Zenith "could" have made a set which would receive the British 405-line system (Govt. Br. 50). However, that is not the relevant question here, for there is no doubt that Zenith could have made such a set; the question is whether it would have been willing to set up a special line for such sets and whether it actually intended to enter the market with such a specially made set in light of the economic factors which indicated that it could expect only limited business in England (see pp. 40-41, *infra*). Indeed, the government acknowledges that the question of Zenith's intention is critical in this case. It states that:

> "The *essential* question rather goes to Zenith's intentions, *i.e.*, did it intend to stay out of the English market until the English government decided whether to change transmission systems?" (Govt. Br. 51).

In its briefs, Zenith has pretended that the documentary evidence to which we referred did not exist. The government, on the other hand, recognizes that it *does* exist and that it constitutes a "firm statement" supporting the conclusion of the Court of Appeals, but then argues that since there is an oral denial by an interested witness, the evidence is in conflict and the Court of Appeals could not rely on the documents (Govt. Br. 51, 52).

Contrary to the government's contention, the contemporaneous documents are controlling. As this Court held in *United States* v. *DuPont & Co.*, 353 U.S. 586, 602 (1957), the "plain implication of the contemporaneous documents, destroys any basis for a [contrary] conclusion." Indeed, the Court of Appeals was not only entitled to rely upon this

contemporaneous documentary evidence, but it would have been error for it to do otherwise:

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we *cannot* under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous" *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 396 (1947).

Curiously, in discussing the conflict between the original testimony and the testimony on recall, the government distinguishes the *U.S. Gypsum* case on the ground that it involved "a direct conflict between trial testimony and contemporaneous documents" (Govt. Br. 50, n.9). However, in discussing the issue with respect to Zenith's waiting for a change in the English television system, the government expressly acknowledges that there *is* a conflict between the oral testimony and the contemporaneous documents, but does not even mention *U.S. Gypsum* as if the well-established rule enunciated in that case and in *DuPont* did not exist (Govt. Br. 51-52).

Even if, contrary to well-settled law, the trial court could rely upon oral testimony of an interested witness over unequivocal contemporaneous documents, it would be error to do so in this case where the witnesses' testimony was demonstrated to be lacking in credibility on material matters relating directly to Zenith's alleged intentions and attempt to enter the English television market (see pp. 12-13, *supra;* and H.R.Br. 31-44). The only testimony to which the government refers is that of Wright and Kaplan, and it is these witnesses who were forced to admit that the testimony they had given at the original trial was not true. The testimony, which they were forced to recant, was that

Zenith had sent television sets to its English distributor which had been converted to the English 405-line system by Zenith or by the distributor in the back room of his shop with kits and parts supplied by Zenith, and that he had attempted to market some sets so converted (see H.R.Br. 33-39). The original testimony was given partially in response to a question raised by the trial judge as to whether American sets would work in England, and it is obvious that the testimony was designed to convince the trial judge that, since conversion was supposedly not a problem, Zenith would have entered the English television market but for the pool (see A. 464). This testimony and the recanting of it not only shows the general unreliability of these witnesses but emphasizes Zenith's lack of a bona fide intention with respect to the English television market.

The government acknowledges that there were "variations in their testimony," and that "[n]o doubt, in their 1965 testimony they at least modified their 1964 assertions" (Govt. Br. 50, n.9).[13] However, the government apparently takes the view that credibility is solely the province of the trial judge and cannot be considered by the Court of Appeals. But, as we pointed out above (p. 15, *supra*), an

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[13] While the government acknowledges a "variation" and modification in the testimony, it appears to say that the original testimony by these witnesses was only that Zenith sets "could" be converted to the English system (see Govt. Br. 15, 50). On the contrary, the clear purport of the testimony of both Wright and Kaplan was that sets *had been* converted. Kaplan: "Mr. Dodds, I would like to answer by saying that this difference is so profound that our distributor *changes* them in his back room" (A. 545). Wright: "Sometimes *we have to make* minor modifications in these sets. They use a slightly different system in England. • • • Oh, Mr. Ramsay in the back room of his little establishment could make the simple repairs and alterations that are necessary to make this work. *We supply him with parts to do that at times*" (A. 464).

appellate court *can* take credibility of witnesses into account when considering whether findings of a trial judge are clearly erroneous under Rule 52(a). See *Jackson* v. *United States*, 353 F.2d 862, 866 (D.C. Cir. 1965), and other cases cited at pages 82-83 of our main brief. This is particularly true where, as here, the matters showing the lack of credibility relate not to demeanor but instead to the fact that the testimony is internally inconsistent, was recanted in material respects, and is contradicted by documents (see pp. 11-15, *supra*). As pointed out by the Court of Appeals in the *Jackson* case:

> "While the trial judge's observation of demeanor must be given appropriate weight, it must be remembered that '[c]*redibility involves more than demeanor.* It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.' Carbo v. United States, 9 Cir., 314 F.2d 718, 749 (1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964)" (353 F.2d at 866).

Moreover, the fact that Zenith was awaiting the change in the British television system to a 625-line system as shown in the Zenith-Ramsay correspondence is also supported by the other circumstances involved. Zenith was not making a 405-line set, but it was then making 625-line sets for export to other markets (A. 3484-85). Zenith knew that its prices would be substantially higher than those of British made television sets (A. 3519-20; H.R.Br. 93, 144).[14] It

[14] Indeed, we pointed out in our main brief that the evidence shows that the Zenith prices would have been so much higher on the average than the average price of British-made television sets, that Zenith could not have expected to make any meaningful penetration of the British television market during the damage period (H.R.Br. 93, 144). In fact, Zenith's average price, considering only the duty and ignoring shipping cost and other obvious costs,

also knew that its experience from entering the English radio market (which was admittedly free of any interference from the pool) was unsuccessful—it never achieved more than token sales amounting at all times to less than two-tenths of one per-cent of the British market. Under the circumstances, it was certainly understandable that Zenith would not want to set up a special line to make sets which were saleable only in England in limited quantities when it could wait for the change in the English system and attempt to supply the market with the 625-line sets which it was already making.

The only fault that the government seems to find in the contemporaneous correspondence between Zenith and Ramsay is that there is only one "firm statement" of Zenith's intentions and it and the other statements of Zenith's "intent to begin exports once the change was made . . . were all made at the end of the damage period" (Govt. Br. 51).

The fact that there is only one document containing a "firm statement" of Zenith's intentions is no answer. There are no contrary documents,[15] and the government itself points out with respect to the other letters which are in evidence:

> "To be sure, each of the extracts quoted by HRI speaks of preparations being made for the anticipated change, and the letters make clear Zenith's intent to *begin* exports once the change was made" (Govt. Br. 51).

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was almost *double* that of the average English-made television set during the damage period, and Wright admitted that Zenith could not expect to make any penetration of the English market if its average prices were double those of the average sets in the market (see A. 3520; H.R.Br. 144).

[15] Zenith did not put in evidence a single document which in any way evidenced an intent or desire to enter the English television market before the expected change to the 625-line system.

The fact that the particular letters in evidence are dated in the last two years of the damage period also does not weaken their force but, if anything, makes it clear that the condition which was keeping Zenith out of the English television market (*i.e.*, the lack of 625-line broadcasting) was in existence right up until the end of the damage period.

The government also suggests that the trial court and this Court could properly assume that the facts evidenced by the letters did not exist in the earlier part of the damage period and states the letters "are not strong evidence of Zenith's intentions up to three years earlier" (Govt. Br. 51). The making of such an unwarranted assumption illustrates the gross injustice which could result from ignoring the additional documentary evidence in the offer of proof. The offer of proof not only contains numerous reports and documents reflecting that the British government's consideration of the possible change to a 625-line system dated back to before the start of the damage period (see, *e.g.*, A. 3645, 3660, 3663-65, 3890, 3894), but it also contains a letter (A. 4075) from Ramsay, Zenith's English distributor, to Zenith dated September 28, 1959 (near the very beginning of the damage period) which encloses a copy of an article from a British trade publication reporting on and quoting an interview with Mr. Ramsay. This article which Ramsay described as "a good write-up on the introduction of Zenith to U.K." (A. 4075) included the following statement:

> "Mr. A. R. Ramsay, Managing Director of United Mercantile, who has recently been for some time in the U.S.A. studying marketing problems, told our representative, 'We shall keep a very close watch on the U.K. market, so that as the situation warrants it we can bring in more Zenith products. *At the moment we are waiting to see what the Government's decision will*

be regarding the third TV channel before we commit ourselves on importing TV receivers.'" (A. 3972; see also A. 4021).

In its zeal to make certain that "unduly heavy burdens" are not imposed upon a treble damage claimant, the government is apparently willing to overlook the settled law of the *U.S. Gypsum* and *DuPont* cases. When, as here, the truth is shown by the contemporaneous documents in evidence, it is certainly not error (or the imposition of an unduly heavy burden on the claimant) for the Court of Appeals to rely upon those documents, as it did (A. 4257). Since the government acknowledges that a finding that Zenith was *not* awaiting the change in the British television system is "essential" to Zenith's case, the Court of Appeals should be affirmed because no such finding can be made in the face of the unequivocal documentary evidence.

2. There Is No Basis for a Finding That Zenith Was Unable to Obtain Distributors During the Damage Period.

The government also recognizes that in addition to intent and preparedness to enter the English television market, proof of injury in this case also requires proof "that the pool made Zenith unable to find dealers, and this inability continued into the damage period" (Govt. Br. 52). Apparently the government's argument is that this burden could be satisfied by a finding, not made by the trial court, that it was "useless" for Zenith to seek distributors in the damage period "in view of the pool's activities" (Govt. Br. 52, 53), and that this could be inferred from the testimony of Zenith's alleged attempts in the 1950's and the evidence of the English pool's alleged policy to bar imports (Govt. Br. 52).

We respectfully submit that such a finding cannot be justified on this record:

First, the fact that Zenith was waiting for a change in the British system during the damage period (see pp. 36-43, *supra*) shows that it was not the pool which prevented Zenith from having dealers and distributors for television in England during that period.

Second, the government's suggestion that a finding that it was reasonable for Zenith to conclude that it should make no further attempts to obtain distributors because it would be unable to find any "in view of the pool's activities" assumes that the pool had done something. But there is no evidence that the English pool took or threatened any action against any importer or distributor at any time since the 1930's (see H.R.Br. 30-31). There was thus simply no evidence of pool "activities" which would justify anyone concluding that it would be unreasonable to attempt to find English television distributors.[16]

Third, the inference the government seeks to draw is inconsistent with other facts, which show it would be patently unreasonable for Zenith to assume, from alleged experiences in the 1950's, that it was useless to seek distributors during the 1959-1963 damage period. The government

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[16] The government refers to a ~~conversion~~ conversation which Wright claimed he had in 1955 with an officer of one of the companies in the English pool (Govt. Br. 12-13). Contrary to the government's characterization, there is no evidence that this person was a "pool representative." Moreover, this conversation can hardly have any probative value with respect to the 1959-1963 damage period because at the time of the alleged conversation there was an absolute government embargo against American sets, making any such conversation purely an academic matter. Moreover, it was before the changes which were made in the pool agreement and license form (see p. 45, n. 17, *infra*), and four years before Zenith appointed its English distributor.

embargo on imports of television sets to England was lifted in 1959, after being in effect and excluding radio and television imports to England for nearly twenty years (H.R.Br. 16-17). We submit that any reasonable businessman, who genuinely wanted to import television sets to England, would, after he discovered the embargo was lifted in 1959, have at least contacted the pool to see if there had been any change in the pool's policy with respect to imports. Yet the record shows that Zenith did not do so.[17] Indeed, the record shows that Zenith was so little interested in the English market after the government decided to continue using the 405-line system on its principal channels that Wright, when he testified in the fall of 1965, did not even know that the pool had gone out of existence on June 30, 1964 (see H.R.Br. 98).

Fourth, there simply is no competent evidence to support the finding which the government suggests could have been entered. The government acknowledges that the testimony with respect to Australia was inadequate and insufficient to support a finding that Zenith had the intention to enter the market and was stopped from doing so by the Australian pool (Govt. Br. 30-32, n. 5). However, concerning alleged attempts to obtain distributors, the testimony is even more worthless with respect to England than Australia. As to Australia, Wright said that he had discussions with people in Australia "with a view to distribution, and there was no question in their mind that we could not

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[17] We pointed out that changes were made in the pool agreement and the pool license form with respect to imports (H.R.Br. 44-46, 95-97). While the government apparently does not agree with our position with respect to the effect of the changes (Govt. Br. 63), it nevertheless agrees that a change was made. We submit that any businessman who was genuinely interested in importing would have at least made an inquiry of the pool in view of the change of the license form and pool agreement and the lifting in 1959 of the embargo. But Zenith did not do so.

get such a license, and there was no use talking about any sort of an arrangement that contemplated that" (A. 476), and he even identified two of the people to whom he had allegedly talked (A. 476). But the only testimony to which the government can point to as to England is Wright's statement that from "'58 on, we talked to several men in England . . . but we were given to understand that television was just out of the question" (A. 474) (see Govt. Br. 13). He identified no such person or gave any details concerning the alleged conversations.[18] We respectfully submit that this testimony, which is even weaker than the testimony on Australia which the government admits is inadequate, would not justify the finding that it was reasonable for Zenith to conclude that it would be useless to seek distributors in the damage period.

Finally, the inference or assumption that Zenith was "unable" to find distributors and that this "inability continued into the damage period" is wrong because the record shows Zenith did have a distributor in England, namely Ramsay, who was *going* to distribute television sets *when and if* the English government changed the system to 625-lines (see pp. 42-43, *supra*). Thus, the fact is that Zenith did not refrain from seeking television distributors because of the pool, but instead because it already had a distributor to whom it had sent some sets to be converted to the 625-line system for display, with the view that he would start marketing them when and if the government adopted a 625-line system.

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[18] It will be noted that contrary to the statement in the government's brief (pp. 51-52), Wright did not testify why, according to these men in England "television was just out of the question." Insofar as it appears, the reason could well have been because of the major differences between sets necessary to receive the English 405-line system, as against the U.S. 525-line system; or the fact that in 1958 the government embargo was still in effect.

C. The Court of Appeals' Decision With Respect to England Should Be Affirmed But if There Is a Remand, It Should Be for Full Consideration on All Available Evidence on the Issue.

We urge that the judgment of the Court of Appeals as to England should also be affirmed. The government apparently suggests that the case should be remanded to the district court for it to decide, "on this record" whether it finds for Zenith on the critical factual issues (Govt. Br. 25). We submit that the record could not justify findings of impact. Further, the findings which were entered by the trial judge and which the government says are inadequate were submitted by Zenith. These findings, prepared by Zenith and adopted by the trial court, were extensive and included many matters which the government itself admits were not true. Surely if Zenith had believed there was any semblance of a basis for the type of findings as to the four-year period involved which the government says are essential, they would have been proposed by Zenith and entered by the trial court.

However, if the case should be remanded, as the government argues, it would be manifestly unjust if Hazeltine Research is not also given a chance to have considered all the evidence it can discover and offer on this question, thereby enabling the trial court to make a fully-informed judgment. Indeed, in light of what has occurred in this case, any further consideration by the trial judge of *any* issue should, in the interests of justice, be a full-scale consideration of that issue, permitting either party to offer all available relevant evidence on that question.

D. There Is No Basis for the Amount of Damages Awarded as to Television in England.

The government agrees that there is "no evidence to support [the] analysis" of the trial court with respect to

the amount of damages awarded to Zenith as to England. It also points out that since Zenith's actual sales of radios in England were far less than the amounts Wright and Kaplan projected, a "reexamination of the damages found with respect to television sets would also seem required" (Govt. Br. 57).

When the district judge concluded that the testimony of Wright and Kaplan estimating damages as to England was not "believable" (A. 3525), the record was left with *no* credible evidence of the amount of Zenith's damages. Since it was Zenith's burden to prove the amount of its damages, the counterclaim should have been dismissed. However, should this Court decide that Zenith should have a second chance to prove the amount of its alleged damages, the consideration of that question by a lower court should take into account all of the relevant evidence either party can discover and offer.

IV. The Charge of Unlawful Conspiracy.

As the government's brief recognizes, the question of legality of the patent pools was not involved in the Court of Appeals' decision, and would not be reached unless the Court of Appeals' decision as to lack of impact of these pools upon Zenith's export business were reversed. Under those circumstances, in our previous brief (H.R.Br. 149-54) we commented only briefly on the question of legality. In view of the government's discussion (Govt. Br. 57-58) we comment on the matter further here, but again only briefly because of the posture of the case.

The government's brief states, quite correctly, that:

> "Of course, foreign patent pools, like foreign cartels, are themselves not subject to the antitrust laws of the

United States" (Govt. Br. 61).[19]

However, the government asserts that such foreign pools are a violation of the Sherman Act if they have the "purpose of excluding American imports" (see Govt. Br. 63) regardless of whether "an actual impact on American export trade is shown" (Govt. Br. 64).

The cases cited do not support this proposition. In fact, in *Strassheim* v. *Daily*, 221 U.S. 280 (1911), which the government says indicates the "limited nature of the holding in *American Banana*," (Govt. Br. 65) the quotation of this Court referred to condemns "Acts done outside a jurisdiction, but intended to produce *and producing* detrimental effects within it. . . ." (221 U.S. at 285).

Another illustration is *Continental Ore Co.* v. *Union Carbide and Carbon Co.*, 370 U.S. 690 (1962), relied upon by the government (Govt. Br. 61), where Justice White based jurisdiction partly on the fact that "the conspiracy . . . was effectuated both here and abroad" (370 U.S. at 706). He also pointed out that the Court had distinguished *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), previously (in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927)) on the ground that "the activities of the defendants *had an impact within the United States* and upon its foreign trade" (370 U.S. at 705).

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[19] We note that at pages 59-60 the government comes very close to suggesting that patent pools in the United States are *per se* unlawful, stating "Patent pools by their nature involve the most flagrant form of the abuses condemned in these cases." We believe no argument is needed to support the principle that "patent pools" are not *per se* unlawful, but rather their legality turns upon the nature of the particular agreement. See Report of Attorney General's National Committee to Study the Antitrust Laws (1955) 242.

In *United States* v. *ALCOA*, 148 F.2d 416, 443-444 (2d Cir. 1945), where the Second Circuit sat on behalf of this Court, Judge Learned Hand stated that where agreements "made beyond our borders" are under attack, both an intent and actual effect on American trade must be shown.[20] Contrary to the government's assertion (Govt. Br. 65), *ALCOA* does not rely on *American Banana*.

Recent text writers on the subject have reached a similar conclusion. Mr. Fugate of the Department of Justice, after reviewing the cases, concluded that all Sherman Act cases based on the foreign commerce clause of the Act, and particularly cases involving foreign-based agreements, must show a "substantial" effect on American trade. Fugate, Foreign Commerce and the Antitrust Laws, 55 (1958); see also, Brewster, Antitrust and American Business Abroad, 65-74 (1958); Timberg, United States and Foreign Antitrust Laws Governing International Business Transactions, in Surrey and Shaw, eds, A Lawyer's Guide to International Business Transactions, 622 (1963); Report of the Attorney General's National Committee to Study the Antitrust Laws, 76 (1955).

The government's brief says that Hazeltine Corporation's presence prevents the pool agreements from being "wholly the work of foreigners" (Govt. Br. 66). But nationality has no effect on the applicability of the rule that a substantial effect on American commerce must be found in cases of this kind. Virtually all of the cases upon which the rule is based involved American firms.

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[20] In United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 958 (D.Mass. 1950), the court stated it was "axiomatic" that private action charged with interfering with exports would not violate the Sherman Act when conditions beyond defendants' control made exports impossible.

V. VACATION OF PARAGRAPH C OF THE INJUNCTIVE DECREE WAS PROPER SINCE THERE WAS NO PROOF OF THREATENED LOSS OR DAMAGE TO ZENITH.

The government argues that the Court of Appeals erred in vacating that part of the injunctive decree relating to foreign pools. The government has seized on the language of the court that "*it follows* from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' . . . cannot be justified" and argues that "the court *apparently* believed that proof of damage is a prerequisite to injunctive relief" (Govt. Br. 68-69).

We do not urge that proof of actual damage is a prerequisite to obtaining injunctive relief and we submit that any fair reading of the Court of Appeals' opinion will demonstrate that it did not apply such a test. The government's interpretation of the court's opinion depends on the assumption that the court had reference only to the ultimate conclusion with respect to the foreign patent pools, *i.e.*, that the fact of damage was not proved. However, the court also reached other conclusions on specific facts concerning each of the pools which showed not only the absence of the "*fact* of damage" but also the absence of any "threatened loss or damage" to Zenith (Australia: A. 4256; England: A. 4257; Canada: A. 4258-59).

The counterclaim seeking injunctive relief was not filed in this case until May 22, 1963 and the trial was in February 1964. Licenses not prohibiting imports had been available from the Australian pool since 1951 (H.R.Br. 134-37). There was no evidence of any actual interference with imports by the English pool since before 1939 (H.R.Br. 29-31). Zenith's last contact with anyone even remotely connected with the English pool was 1955 (eight years before the

counterclaim was filed), and Zenith appointed a distributor in 1959 who had been importing and selling Zenith radios in England and who in the four years he had been in business before the filing of the counterclaim had not even been contacted by the pool (H.R.Br. 30, 93, 156). Similarly, the last contact between Zenith and the Canadian pool was four years before the filing of the counterclaim for injunctive relief and almost five years before the trial. In the four years immediately preceding the filing of the counterclaim, Zenith imported tens of thousands of sets into Canada and the pool took no action (H.R.Br. 50-53, 100-02, 107).

Under the circumstances, the Court of Appeals was certainly justified in concluding that there was no present threat to Zenith. As this Court held in *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952), it is not proper to infer a threatened violation of the antitrust laws from ancient evidence of past violations; there must be proof of "a *real threat* of future violation or a contemporary violation of a nature likely to continue or recur."

The government also urges that this Court adopt a rule that in private antitrust cases a trial court can enter an injunction "without requiring proof of specific current threats directed at the plaintiff," and that a trial court may instead base the injunctive order on proof of a "conspiracy to restrain *the type of trade*" in which the plaintiff is engaged, unless the record "clearly establishes" that the conspiracy or its unlawful purposes has been abandoned (Govt. Br. 71). This argument is contrary to all authorities. Section 16 requires the party seeking the relief to prove "threatened loss or damage", *Ring* v. *Author's League of America*, 186 F.2d 637, 642-43 (2d Cir. 1951), *cert. denied*, 341 U.S. 935 (1951); and as this Court noted in *United States* v. *Borden*, 347 U.S. 514, 518 (1954), a private claim-

ant "may obtain injunctive relief against such violations *only* on a showing of threatened loss or damage, *and this must be of a sort personal to the plaintiff*." It is thus clear that threatened loss or damage "personal" to the claimant cannot be presumed from a conspiracy to restrain "the type" of trade in which the plaintiff is engaged.

VI. DOMESTIC PATENT MISUSE

The government's brief acknowledges that the color patent proposals made by Hazeltine Research to Zenith, argued at length to this Court by Zenith (see Z. Br. pp. 38-40, 106-07) are "no longer in issue" (Govt. Br. 20). It also acknowledges that the 50-80-100% formula is not an issue here because the Court of Appeals' decision concerning that formula "does not seem to have affected the relief granted" (Govt. Br. 22). The government takes issue only with the Court of Appeals' holding with respect to the provision in Hazeltine Research's licensing proposals calling for measuring the royalty by the licensee's total production of receivers of the type licensed. It urges that the Court of Appeals' reliance on this Court's decision in *Automatic Radio* v. *Hazeltine Research*, 339 U.S. 827 (1950) was misplaced under the facts of this case.

In *Automatic Radio*, this Court considered this same royalty provision and held that "it is not per se a misuse of patents to measure the consideration by a percentage of the licensee's sales." (339 U.S. at 834). The government's primary contention is that the "rationale" of *Automatic Radio* "should apply only to situations where it is proven that the parties, bargaining as equals, freely agreed . . . [to] computation of royalties" on this basis (Govt. Br. 76-77). However, if agreeing on this method of computing royalties is permissible, it follows that it must likewise be

permissible for *someone,* presumably the licensor, *to propose* such a provision to the prospective licensee, and that is all that Hazeltine Research did here. The government acknowledges that "Zenith appears *never* to have specifically objected to the provision . . ." (Govt. Br. 77), and as we have shown the record is void of any evidence that this provision was ever even discussed between Zenith and Hazeltine Research (H.R.Br. 164). Thus, there has been no "insistence" or "demand" by Hazeltine Research that Zenith accept this provision. On the contrary, it was merely offered to Zenith without discussion and we submit that such an offer is certainly permissible under *Automatic Radio,* even under the government's interpretation of that case.

The fact is that the negotiations never even got to the question of how to measure royalties. Zenith took the position that it was not infringing any black and white patent and needed no license of any kind (H.R.Br. 162; Z.Br. 38); and as to the color patents, the negotiations never got to the point of a serious discussion between Hazeltine Research and Zenith as to terms. In fact, Hazeltine Research transmitted a form of color license agreement to Zenith in March 1963 together with an invitation to discuss it and Zenith did not respond (H.R.Br. 164).

Certainly if a patent licensor and licensee may legally *enter into* an agreement whereby royalties are measured by total production, as the government seems to agree, it must be permissible for the prospective licensor to propose such an arrangement. As has already been pointed out in Hazeltine Research's main brief (H.R.Br. 164-65), the situation might well be different if the licensor were to *insist* that royalties be measured by total production, but that circumstance is not present here.

CONCLUSION

For the reasons set forth in this brief and in the briefs we have previously filed in this case, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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